

FT View

Peace is paramount

EID ul-Fitr was celebrated on a somewhat muted note this year, with recent intolerance and communal violence marring the inclusiveness of the celebrations. President Mahinda Rajapaksa in his message commended the valuable contributions made by the Muslim community towards the development of Sri Lanka, but disappointingly brushed over the disturbing deepening of ethnic tensions.

Although Sri Lanka's Constitution and other laws and policies protect religious freedom, there was an overall decrease in societal respect for religious freedom, as Buddhist nationalist groups led campaigns targeting Muslims and Christians, the International Religious Freedom Report for 2013 released by the United States on Monday has pointed out. The US report criticised the local authorities for failing to respond effectively to communal violence, including attacks on members of minority religious groups, and to bring the perpetrators to justice.

The 2013 International Religious Freedom Report released Monday by the Bureau of Democracy, Human Rights, and Labour documents how, where and when the universal right to religious freedom was violated or protected in nearly 200 countries around the world. The report noted that when governments choose not to combat discrimination on the basis of religion and intolerance, it breeds an environment in which intolerant and violent groups are emboldened, even to the point of physically attacking individuals on the basis of their religious beliefs.

It cannot be denied that with the advent of the Bodu Bala Sena and other hardline organisations in Sri Lanka, the intensity of bigoted actions has increased. The number of derogatory racist remarks and tokenisation of religions and individuals, the warping of the diverse history inherited by Sri Lanka and spread of virulent and often inaccurate information to whip up racial hatred are on the rise.

The Government has disappointingly failed to arrest these trends. Instead it has attempted to frame the situation in a misleading way by establishing a separate Police Unit to deal with religious tensions. This is insinuating the Buddhist and Muslim communities have problems with each other when the reality is that unchecked extremist organisations are behind most tensions. What is even more worrying is that the legitimate and once-tolerant hierarchy organisations within the Maha Sangha themselves are increasingly seen to be giving legitimacy to these hardliners.

Last year during the much-publicised Halal controversy, social media was used to malign certain products and urge users to boycott shopping at popular Muslim shops. These posts are accompanied by insulting remarks that make reasoned argument or discussion impossible. They are also anonymous, so holding people accountable is difficult.

Making the sacrifice to maintain peace, the Muslim community ended the Halal certification process for local companies and agreed to give it free of charge for exporters. Weeks before fasting began this year, the tragic riots of Aluthgama and Beruwala took place, killing people, destroying hundreds of homes and shops and leaving over 1,000 people displaced. These people are still suffering and many others live in fear. Events came to such a pass due to the increase in hardline factions and the inability or reluctance by the Government to quell them. Because of them old wounds are being reopened and new rivalries are being created.

Already struggling with reconciliation after the end of a three-decade war, it seems Sri Lanka is in danger of repeating the same mistakes as it did decades ago. Surely it is time to step up and make sure history does not repeat itself.

Public Procurement Law: Can new laws be enacted to establish level playing field for bidders?

Legislative framework required for transparency in public procurement

GOOD governance demands transparency in all areas of government. Once transparency and accountability mechanisms are in place, it could certainly augment governments' standing in the eyes of the donors, international financial institutions such as IMF, IFC, ADB, World Bank and of course the international community.

The Government has come under the microscope of international community which can be gauged from the recent untoward incidents in Beruwala and Aluthgama where UN Secretary General Ban Ki-moon too had commented.

The Government of Sri Lanka's public procurement process is governed by two guidebooks issued by the Treasury to supplement Financial Regulations. There is an absence of a proper legal framework where procedure, accountability, transparency and remedies could be articulated. There is a misconception among bidders that the bid with the lowest price should be accepted.

The procurement decisions are based on various factors that involve the technical compliance, financial stability of the bidder; Most Economically Advantageous Bid (MEAT), previous track record and financial evaluation of the bid. The National Procurement Agency is not an agency formed under a legislative framework but carries on work under the direction of the Cabinet of Ministers.

What is required is a legislative framework that would provide parameters for procurement decisions so that much needed transparency and accountability could be established. It would also bring value to public money and people could expect a better service. No blame would therefore accrue to the Government.

The ambit of the Fiscal Management (Responsibility) Act, which was a brainchild of Opposition Leader Ranil Wickremesinghe, was to provide a statement on the fiscal strategy of the Government. A similar piece of legislation would be required for public procurement so that all transactions can be conducted in a very transparent and responsible manner and a level playing field is created for Government suppliers and contractors. The legal framework should be able to take the public officials to the task when there are procedural violations which amount to serious breach of public trust.

The Government has thwarted the UNP-sponsored Right to Information Bill which should have been considered as a bipartisan legislative proposal with amendments from the Government side as well. The rejection of the Right to Information Bill, lock, stock and barrel, was a faux pas in demonstrating the Government's commitment to good governance. If the bill had been enacted with bipartisan efforts, it would certainly have been a unique opportunity to enhance the Government's standing overseas.

Ethics in public procurement

Public officials have a moral duty to detach/recuse themselves from any deliberation involving their decision in public procurement when there is a manifest conflict of interest. It would be difficult to describe morality in a given situation.

In some cases family members of public officials may be involved in the procurement process. Bidders could have family connections. In such a situation the public officials must exercise utmost caution as it would lead to allegations of corruption and malfeasance. A 'disclosure form' must be filled up by a public official if there is a 'pecuniary interest' which would undermine the procurement decision.

Pecuniary interest could be in the form of a political or ideological affiliation, investments in shares of a bidding company by the public official or his family members, an important employment held by a family member in a bidding company and it would render the procurement decision 'bias,' etc.

This process is somewhat akin to selecting jurors for a criminal trial where jurors are asked to make a decision solely based on facts of the case. When selecting juror members, the defence counsel would object to any member who is having family connections to the victim.

Globally-accepted public procurement laws describe 'pecuniary interest' as being a personal interest in a contract. Public officials must strictly observe any 'pecuniary interest' and recuse him from taking part in any procurement decisions committees or tender committees. OECD Principles for Integrity in Public Procurement (an OECD publication) calls on Government to 'provide an adequate degree of transparency in the entire procurement cycle in order to promote fair and equitable treatment for potential suppliers'.

OECD also calls on 'governments to empower civil society organisations, media and the wider public to scrutinise public procurement. Civil society organisations, media and the wider public should have access to public information on the key terms of major contracts. The reports of supreme audit institutions should also be made widely available to enhance public scrutiny'.



There have been some ground-swellng judgements delivered in favour of citizens by the Supreme Court of Sri Lanka in the recent past

Since there is no Right to Information Act the procurement process would continue to function without public scrutiny. If the public works are done with a semblance of moral standards of the society, there is at least some satisfaction. At the end of the day work done 'for public good' is measured by the utility of the public works undertaken.

UN proposed Model Law

The UN resolution adopted in 1994 was for "harmonisation and unification of the law of international trade and in that respect to bear in mind the interests of all peoples, in particular those of developing countries, in the extensive development of international trade".

As a consequence of this resolution United Nations Commission on Trade Law (UNCITRAL) has proposed a Model Law which "allows government purchasers to take advantage of modern commercial techniques, such as e-procurement and framework agreements, to allow it to maximise value for money in procurement. The Law contains procedures to allow for standard procurement, urgent or emergency procurement, simple and low-value procurement, and large and complex projects (in which, and

where appropriate, the government can interact with potential suppliers and contractors to obtain the best solution to its needs). All procedures are subject to rigorous transparency mechanisms and requirements to promote competition and objectivity. All decisions and actions taken in the procurement process can be challenged by potential suppliers.

"While the government purchaser therefore has discretion in deciding what to purchase and how to conduct the procurement, that discretion is subject to safeguards that are consistent with other international standards – notably, those imposed by the United Nations Convention Against Corruption. The Model Law allows the enacting State to pursue its domestic policy objectives – such as promoting economic development through the support of SMEs – to the extent that the government's international commitments allow. The Model Law has also been prepared with a view to supporting the harmonisation of international standards in public procurement, and takes account of the provisions of the WTO Agreement on Government Procurement, the European Union Directives (on procurement and remedies), the UN Convention Against Corruption, the Procurement Guidelines and Consultant Guidelines of the World Bank and the equivalent documents of other IFIs.

"The Model Law is aimed at assisting States in formulating a modern procurement law. Although developing countries and States whose economies are in transition were the main users of the 1994 text, the new Model Law reflects international best practice and is designed to be appropriate for all States."

It is high time the Government took stock of the global trends in public procurement and introduced legislative framework for public procurement.

Comparative Law in public procurement

Transparency and fairness in public procure-

ment process in the European Union (EU) is very rigorous and each transaction is monitored closely by the member countries in view of the stiff completion. UK has introduced new transparency rules across all government operations. New rules stipulate that all new contracts must be published online, tender documents for contracts over £10,000 or above must be published on a single website so that public can access and contract documents must be published in full.

There is a website, www.contractsfinderbusinesslink.gov.uk, which was launched in January 2011 as the Government's single source which provides public access and provides procurement-related information. Even the World Trade Organisation (WTO) is also monitoring government procurement and WTO requires that governments must promote free international trade and must not take legislative measures to protect local industries or discriminate against foreign supplies.

Damages in Public Procurement Law

In the case Larson & Toubro Ltd Vs. Gujarat State Petroleum Corporation, the court found that consultants who prepared the technical documents and the specifications for the public tender had purposely restricted the specifications so that only one particular manufacture could tender for the bid. The specifications had been so articulated that other competitive bidders had been left out as their products would not fit in with the description.

There are similar loopholes in the public procurement process. A plethora of cases involving public procurement can be found in overseas jurisdictions. A lot can be learnt from the comparative law and jurisprudence. In some countries the unsuccessful bidders could seek explanations from public authorities as to why their bid was rejected. Public Procurement Law is not yet developed in Sri Lanka.

Under European Union (EU) Law, public procurement process, bidders can challenge the procurement decisions by public authorities and seek revisions or damages for harm done. EU says (ref. Public Procurement Law, damages as an effective remedy by Duncan Fairgrieve) that 'when the awarding public authority has committed a fault in the tendering process, any unsuccessful bidder may be granted damages provided that he can prove the 'loss of a chance' of being awarded a contract'.

Sri Lanka does have a very salutary provision in the Constitution. The bidders could seek refuge under Fundamental Rights provision if there is an unfair practice adopted by a public authority. It seems that Supreme Court has not been adequately moved by aggrieved parties in this area of litigation. It could be due to lack of knowledge in constitutional rights of citizens.

Could it be that people have lost confidence in the Judiciary, hence display a muted public consciousness? There have been some ground-swellng judgements delivered in favour of citizens by the Supreme Court of Sri Lanka in the recent past in relation to Insurance Corporation and Golf Course.

Aggrieved bidders could still seek justice from the Supreme Court on fundamental rights enshrined in the Constitution. The Court of Appeal has the writ jurisdiction where injunctions can be sought to halt a public procurement decision by a public authority.

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